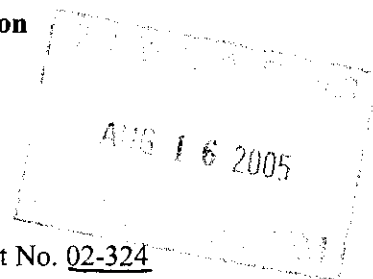


Before the
Federal Communications Commission
Washington, D.C. 20554



In the matter of)	
)	
International Settlements Policy Reform)	
International Settlement Rates)	IB Docket No. <u>02-324</u>
)	
AT&T Corp. Emergency Petition for Settlements)	IB Docket No. 96-261
Stop Payment Order and Request for Immediate)	
Interim Relief)	
)	
and)	
)	IB Docket No. 03-38
Petition of WorldCom, Inc. For Prevention of)	
"Whipsawing" on the U.S.-Philippines Route)	
)	

ORDER ON RECONSIDERATION AND ORDER

Adopted: August 9, 2005

Released: August 15, 2005

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration and Order, we address two matters arising from actions taken by the Commission to protect U.S. consumers from previous anticompetitive conduct on the U.S.-Philippines route. First, we affirm, in the Order on Reconsideration, a prior Commission decision¹ that upheld an order by the International Bureau finding that six Philippine carriers had engaged in anticompetitive conduct and disrupted service on the U.S.-Philippine route to the detriment of U.S. consumers.² Second, we exempt the U.S.-Philippines route from our International Settlements Policy (ISP) in accordance with our *ISP Reform Order*.³

II. BACKGROUND

2. On February 7, 2003, AT&T and MCI filed petitions alleging that certain Philippine carriers had demanded increases in termination rates and had blocked circuits with the U.S. carriers that had declined to agree to the demanded rate increases. In response to the petitions, on March 10, 2003, the International Bureau issued an order that found that PLDT, the dominant telecommunications carrier in

¹ See *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" on the U.S.-Philippines Route*, IB Docket No. 03-38, Order on Review, 19 FCC Rcd 9993 (2004) (*Order on Review*).

² *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" on the U.S.-Philippines Route*, IB Docket No. 03-38, Order, 18 FCC Rcd 3519 (2003) (*2003 Bureau Order*).

³ See *International Settlements Policy Reform: International Settlement Rates*, IB Docket Nos. 02-324 and 96-21, First Report and Order, 19 FCC Rcd 5709 (2004) (*ISP Reform Order*).

the Philippines,⁴ had “whipsawed” U.S. carriers by threatening and then following through on the threat of blocking U.S. carriers’ circuits to force a rate increase on U.S. carriers.⁵ The Bureau also found that five other Philippine carriers, together with PLDT, had “whipsawed” U.S. carriers into a rate increase.⁶ The Bureau ordered all U.S. carriers providing facilities-based services to suspend payments for termination services to the Philippine carriers pending restoration of AT&T’s and MCI’s circuits. In addition, the Bureau removed the U.S.-Philippines route from the Commission’s list of routes qualifying for International Simple Resale (ISR)⁷ and required U.S. carriers, as of February 1, 2003, to comply with the requirements of the Commission’s ISP for all traffic terminated on that route.⁸

3. On April 9, 2003, PLDT, Globe, and ABS-CBN/Bayantel filed Applications for Review seeking Commission review of the *2003 Bureau Order*.⁹ AT&T and MCI opposed the Applications for Review.¹⁰ PLDT, Globe, and ABS-CBN/Bayantel filed replies to the opposition comments on May 5,

⁴ *The International Bureau Revises and Reissues the Commission’s List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, 19 FCC Rcd 20385, 20390 (Int’l Bur. 2004) (*Foreign Carrier Public Notice*).

⁵ See *2003 Bureau Order*, 18 FCC Rcd at 3525-30, ¶¶ 10-13. The term “whipsawing” refers to a broad range of anticompetitive behaviors by foreign carriers possessing market power, in which the foreign firms exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers. If a U.S. carrier does not pay the above-cost settlement rate for terminating its international traffic, it will lose business to a U.S. rival that is willing to pay the higher rate. See, e.g., *AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order, 11 FCC Rcd 18014, 18014, ¶ 1 (1996) (*Argentina Order*) (“The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers.”); *Sprint Communications Company, L.P., Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico*, Memorandum, Opinion and Order, 13 FCC Rcd 24998, 25000-01, ¶ 6 (1998) (*Mexico Order*) (“The Bureau has strictly enforced the Commission’s regulations against whipsawing.”). See also *Cable & Wireless v. FCC*, 166 F.3d 1224, 1226 (D.C. Cir. 1999) (“The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market.”); *2003 Bureau Order*, 18 FCC Rcd at 3525-26, ¶ 10.

⁶ *2003 Bureau Order*, 18 FCC Rcd at 3523, 3528, ¶¶ 12 & 17.

⁷ ISR, or the provision of switched services over resold or facilities-based private lines that connect to the public switched network at either end-point, permits U.S. carriers with the appropriate section 214 authorization to engage in more commercially-oriented agreements that do not strictly adhere to the restrictions of the ISP on routes where the risks of competitive harm from such deviation are deemed low by demonstration of more cost-based settlement rates or equivalent opportunities in the foreign market to provide private line service. Under the Commission’s ISR policy, U.S. carriers on ISR-approved routes may enter into contracts for the exchange of traffic with foreign incumbents outside the ISP. The ISR policy was eliminated upon the effective date of our *ISP Reform Order*. *ISP Reform Order*, 19 FCC Rcd at 5725, ¶ 31.

⁸ The ISP governs how U.S. carriers negotiate with foreign carriers for the exchange of international traffic and is the structure by which the Commission has sought to respond to concerns that foreign carriers with market power are able to take advantage of the presence of multiple U.S. carriers serving a particular market. The Commission recently modified the ISP to exempt its application to “benchmark compliant” countries. See *ISP Reform Order*, 19 FCC Rcd 5709.

⁹ See PLDT Application for Review, IB Docket No. 03-38 (filed Apr. 9, 2003); Globe Application for Review, IB Docket No. 03-38 (filed Apr. 9, 2003); ABS-CBN/Bayantel Application for Review, IB Docket No. 03-38 (filed Apr. 9, 2003).

¹⁰ AT&T Opposition to Applications for Review, IB Docket No. 03-38 (filed Apr. 24, 2003); MCI Opposition to Applications for Review, IB Docket No. 03-38 (filed Apr. 24, 2003).

2003.¹¹ Subsequent to the release of the *2003 Bureau Order*, the carriers informed the Commission that they had reached interim settlement agreements and the Philippine carriers had restored the circuits on the U.S.-Philippine route.¹² The Bureau immediately issued public notices lifting the stop-payment order as it applied to each Philippine carrier that restored circuits.¹³

4. In addition, Access, a telecommunications carrier authorized by the Commission pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international telecommunications service, filed a Petition for Enforcement of the *2003 Bureau Order* that asked the Commission, among other things, to direct all U.S. carriers terminating traffic to the Philippines to make publicly available the accounting rates and settlement rates in effect between U.S. carriers and PLDT from the effective date of the *2003 Bureau Order*.¹⁴

5. On March 30, 2004, the Commission released its *ISP Reform Order* that revised its policy and rules to remove the ISP from benchmark-compliant routes.¹⁵ In that order, the Commission identified ninety-six routes that clearly qualified for exemption from the ISP pursuant to the new rules.¹⁶ The Commission also identified 77 routes, including the U.S.-Philippines route, believed to be benchmark-compliant,¹⁷ and provided the opportunity for comment on those routes.¹⁸ The Commission stated that it

¹¹ PLDT Reply to Oppositions to Applications for Review, IB Docket No. 03-38 (filed May 5, 2003); Globe Reply to AT&T and MCI Oppositions to Globe's Application for Review, IB Docket No. 03-38 (filed May 5, 2003); ABS-CBN/Bayantel Reply to Oppositions, IB Docket No. 03-38 (filed May 5, 2003).

¹² See, e.g., Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (filed Oct. 6, 2003); Letter from Scott S. Shefferman, Associate Counsel, MCI, to Marlene Dortch, Secretary, Federal Communications Commission (filed Nov. 14, 2003); Letter from Maria Cattafesta, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 19, 2003); Letter from Patrick J. Donovan, Counsel for IT&E, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 03-38 (filed Dec. 9, 2003); Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (filed Jan. 12, 2004); Letter from Scott A. Shefferman, Associate Counsel, MCI, to Marlene Dortch, Secretary, Federal Communications Commission (filed Jan. 22, 2004); Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (filed Jan. 26, 2004).

¹³ See *AT&T Circuits to the Philippines Reactivated by Digital Telecommunications Philippines, Inc. and Bayan Telecommunications Company: Suspension Lifted on U.S. Carrier Payments to These Carriers*, 18 FCC Rcd 6253 (Int'l Bur. 2003); *AT&T and MCI Circuits to the Philippines Reactivated by Smart: Suspension lifted on U.S. Carrier Payments to Smart*, 18 FCC Rcd 24038 (Int'l Bur. 2003); *AT&T and MCI Circuits to the Philippines Reactivated by PLDT: Suspension Lifted on U.S. Carrier Payments to PLDT*, 19 FCC Rcd 427 (Int'l Bur. 2004); *AT&T and MCI Circuits to the Philippines Reactivated by Globe: Suspension Lifted on U.S. Carrier Payments to Globe*, 19 FCC Rcd 1182 (Int'l Bur. 2004); *Suspension Lifted on U.S. Carrier Payments to Subic*, 19 FCC Rcd 2638 (Int'l Bur. 2004).

¹⁴ Petition for Enforcement, filed by International Access, Inc., d/b/a Access International (Access), IB Docket No. 03-38 (filed March 12, 2004) (Access Petition for Enforcement). See Comments of International Access Inc. d/b/a Access International at 2 (filed June 28, 2004) (Access Comments).

¹⁵ See *ISP Reform Order*, 19 FCC Rcd 5709.

¹⁶ See *id.* at 5771, Appendix D.

¹⁷ See *id.* at 5772, Appendix E.

¹⁸ The *ISP Reform Order* became effective on May 28, 2004. On that date, the International Bureau issued a public notice setting the notice and comment dates for the list of routes believed to be benchmark-compliant. See *International Settlements Policy Reform and International Settlement Rates*, 69 Fed. Reg. 23151 (Apr. 28, 2004).

would remove the ISP from benchmark-compliant routes after a full review of the issues pleaded for those routes on which issues were raised.¹⁹

6. The Commission received several filings with regard to lifting the ISP from the U.S.-Philippines route. AT&T, MCI, Sprint, BayanTel, and PLDT support the removal of the ISP from the U.S.-Philippines route.²⁰ Only Access opposes the removal of the ISP from that route.²¹ Additionally, AT&T, MCI and Sprint certify, in their subsequent filings, that they had negotiated benchmark-compliant rates on the U.S.-Philippines route.²²

7. On June 4, 2004, the Commission released an *Order on Review*, affirming the Bureau's finding that the Philippine carriers named in the 2003 *Bureau Order* had "whipsawed" U.S. carriers, thereby harming U.S. consumers. In addition, the Commission upheld the International Bureau's action ordering the suspension of payments for termination services to the Philippine carriers pending restoration of circuits.²³ The *Order on Review* also dismissed the Petition for Enforcement filed by Access.²⁴

8. On July 6, 2004, PLDT filed a Petition for Reconsideration of the Commission's decision in the *Order on Review*, arguing that the Commission should have vacated as moot the underlying 2003 *Bureau Order*.²⁵ Specifically, PLDT again argues that, because AT&T and MCI have reached agreements with all the relevant Philippine carriers and circuits on the U.S.-Philippine route have been

¹⁹ With respect to the U.S.-Philippines route, the Bureau stated that it would issue a separate order after having an opportunity to conduct a complete review of the issues and concerns raised during the comment period. See *Additional U.S.-International Routes Exempted from the International Settlements Policy*, IB Docket Nos. 02-324, 96-261, Public Notice, 19 FCC Rcd 22032 (2004).

²⁰ See, e.g., Comment of AT&T Corp. on Removal of the International Settlements Policy (filed June 28, 2004) (AT&T Comments); Reply Comments of Sprint Corporation (filed July 13, 2004) (Sprint Reply); Reply Comments of BayanTel (filed July 13, 2004) (BayanTel Reply); Reply Comments of PLDT (filed July 13, 2004) (PLDT Reply); Reply Comments of MCI, Inc. (filed July 15, 2004) (MCI Reply). Although MCI's reply comments were submitted after the pleading cycle had closed, we consider their comments to ensure completeness of the record.

²¹ See, e.g., Access Comments; Reply Comments of International Access Inc. d/b/a Access International (filed July 13, 2004) (Access Reply); Letter from Mitchell Brecher, Counsel for Access, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 02-324, 96-261 (filed Sept. 23, 2004) (Sept. 23 Access Letter); Letter from Mitchell Brecher, Counsel for Access, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 03-38, 02-324, 96-261 (filed March 30, 2005) (Mar. 30 Access Letter); Letter from Mitchell Brecher, Counsel for Access, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 03-38, 02-324, 96-261 (filed May 4, 2005) (May 4 Access Letter).

²² See Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 02-324, 96-261 (filed Sept. 24, 2004) (Sept. 24 AT&T Letter); Letter from David A. Nall, General Attorney, Sprint, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 02-324, 96-261 (filed Sept. 28, 2004) (Sept. 28 Sprint Letter); Comments of MCI, Inc. (filed Sept. 29, 2004) (MCI Comments); Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 02-324, 96-261 (filed Oct. 4, 2004) (Oct. 4 AT&T Letter); Letter from Scott Shefferman, Director, International Affairs, MCI to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 02-324, 96-261 (filed Oct. 5, 2004) (Oct. 5 MCI Letter); Letter from David A. Nall, General Attorney, Sprint, to Marlene Dortch, Secretary, Federal Communications Commission, IB Docket Nos. 02-324, 96-261 (filed Oct. 5, 2004) (Oct. 5 Sprint Letter).

²³ *Order on Review*, 19 FCC Rcd 9993.

²⁴ *Id.* at 9995, n.9 (noting that "[t]he Commission does not require carriers to file interim agreements under the ISP. To the extent that Access may have more expansive competitive concerns, it may avail itself of the any of the competitive safeguards or procedures available under our rules and highlighted in the [] *ISP Reform Order*.").

²⁵ PLDT Petition for Reconsideration, IB Docket No. 03-38 (filed July 6, 2004) (PLDT Petition for Reconsideration).

restored, there is no “live case or controversy.”²⁶ Thus, PLDT claims, “long-standing Commission policy” requires vacation of the Bureau’s order. PLDT also argues that there is no benefit to the order remaining in effect because it does not have precedential value and that vacating the Bureau’s order would promote comity between the United States and the Philippines as well as promote the public interest.²⁷

III. PLDT PETITION FOR RECONSIDERATION

9. In this Order on Reconsideration, we deny the Petition for Reconsideration filed by PLDT²⁸ and affirm the Commission’s *Order on Review*²⁹ that upheld a March 10, 2003 order by the Chief of the International Bureau.³⁰ The International Bureau’s order found that six Philippine carriers had engaged in anticompetitive conduct and had disrupted service on the U.S.-Philippine route, to the detriment of U.S. consumers. PLDT’s Petition for Reconsideration argues that the Commission should have vacated the Bureau’s order as moot. We find that PLDT has not satisfied either the showing required for reconsideration of the *Order on Review* or the heavy burden of demonstrating that there are special circumstances beyond the mere fact of settlement of a controversy that warrant vacating the underlying International Bureau order.

10. **Discussion.** Pursuant to section 1.106 of our rules, parties may petition for reconsideration of final Commission actions.³¹ Reconsideration is generally appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to respond.³² Moreover, with respect to vacatur, the Commission presumes that its orders should remain intact and may hold otherwise only if the parties make an exceptional demonstration of good cause.³³ Indeed, the Commission will deny requests to vacate unless the parties meet the significant burden of demonstrating “some special circumstances beyond the mere fact that the case has been settled.”³⁴

²⁶ *Id.* at 2, 4-5.

²⁷ *Id.* at 5-9.

²⁸ See PLDT Petition for Reconsideration.

²⁹ *Order on Review*, 19 FCC Rcd 9993.

³⁰ *2003 Bureau Order*, 18 FCC Rcd 3519.

³¹ Section 1.106 of the Commission’s rules states, in pertinent part, that:

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary due diligence, have been learned prior to such opportunity. 47 C.F.R. § 1.106.

³² See *Applications of AT&T Wireless Services, Inc., and Cingular Wireless Corporation, et. al.*, FCC 05-88, Order on Reconsideration, 20 FCC Rcd 8660, 8662-63, ¶ 8 (2005).

³³ See *Starpower Communications LLC v. Verizon South Inc.*, Order, File No. EB-00-MD-19, 19 FCC Rcd 7592, 7594, ¶ 5 (2004) (*Starpower*).

³⁴ *Cavalier Telephone, LLC v. Virginia Electric and Power Company d/b/a Virginia Power*, Order, 17 FCC Rcd 24414, 24419-20, ¶ 16 (Enf. Bur. 2002) (*Cavalier v. VEPCO*) (citing *Applications of Crystal Communications, et al.*, Order, 12 FCC Rcd 2149, 2151, ¶ 6 (1997)); *U.S. Bancorp Mortgage v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (*U.S. Bancorp Mortgage*) (requiring “exceptional circumstances” vacatur of a judgment under review due to settlement). See *Starpower*, 19 FCC Rcd 7592.

11. PLDT fails to provide any new facts for reconsideration,³⁵ and we find no material error or omission in the Commission's *Order on Review* that would lead us to a different conclusion. In addition, PLDT has not met its burden of demonstrating that there are special circumstances that warrant vacatur of the 2003 *Bureau Order*. PLDT's Petition for Reconsideration reargues issues previously raised in its Application for Review – arguments that were addressed squarely by the Commission in its *Order on Review*. Accordingly, we deny PLDT's request to reconsider the *Order on Review* and to vacate the International Bureau's March 10, 2003 *Order*.

12. PLDT renews its argument that changes in circumstances warrant vacatur of that order. Specifically, PLDT again argues that, subsequent to release of the 2003 *Bureau Order*, carriers reached agreements and restored circuits between the United States and the Philippines, resolving the case or controversy and mooted the findings of the 2003 *Bureau Order* – including the finding that the Philippine carriers had engaged in “whipsawing.”³⁶ First, as the Commission stated in the *Order on Review*, the fact that carriers negotiated interim settlement agreements and restored circuits on the route is not proof that the case or controversy has been resolved. The Commission addressed this argument squarely in the *Order on Review*. It noted that U.S. carriers had entered into interim agreements with the Philippine carriers to keep the circuits open and there had been no final agreements filed with the Commission leaving future, final agreements subject to continued negotiation. At that time, the Commission stated that “it is not clear that the commercial dispute between U.S. and Philippine carriers has been brought to a conclusion.”³⁷ As of today, those circumstances have not changed.

13. Moreover, assuming *arguendo* that the case had been resolved, as is the contention of PLDT, PLDT fails to present special circumstances that changes the Commission's finding in the *Order on Review* that final resolution of the commercial dispute between U.S. and Philippine carriers does not render moot the International Bureau's determination that the Philippine carriers engaged in “whipsawing.”³⁸

14. We reject PLDT's argument that Commission policy requires that the Bureau's *Order* be vacated as moot.³⁹ Indeed we find that *Seven Hills*, on which PLDT relies to support its proposition that “long-standing Commission policy” requires us to vacate the Bureau's order as moot, is inapposite.⁴⁰ In *Seven Hills*, the Commission vacated a case in which the settlement eliminated the need to resolve an outstanding issue. In the instant case, the commercial settlement between the carriers has no bearing on the Commission's finding that the Philippine carriers' past conduct amounted to “whipsawing.” Moreover, in a more recent and relevant Commission decision, *Starpower Communications*, the Commission declared its unwillingness to vacate a decision based on the parties' settlement of a dispute. In that case, the Commission denied the parties' joint motion to vacate a Commission decision, stating

³⁵ Citing to 47 C.F.R. § 1.429(b), PLDT appears to argue that certain events set forth in *ex parte* letters submitted by PLDT's counsel after the formal pleading cycle closed reflect changed circumstances that should be considered pursuant to the standard set forth in section 1.1459(b) or our rules. See PLDT Petition for Reconsideration at 1, n.1; 47 C.F.R. § 1.429(b). We note that the standard of 47 C.F.R. § 1.429 pertains to rulemaking proceedings and not to adjudications, which is the case here.

³⁶ PLDT Petition for Reconsideration at 4-8.

³⁷ See *Order on Review*, 19 FCC Rcd at 10016-17, ¶ 45.

³⁸ See *id.* at 10016, ¶ 44. See also *U.S. Bancorp Mortgage*, 513 U.S. 18, 25 (“Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary process of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice.”).

³⁹ See PLDT Petition for Reconsideration at 5 (citing *Seven Hills*, *Woodlinger* and *Guam Telephone Authority*).

⁴⁰ *Id.*

that, "although we strongly support efforts by parties to settle disputes, we deny the motion because the parties have not satisfied their heavy burden of demonstrating that there are special circumstances beyond the mere fact of settlement that warrant vacatur of the Commission's decision."⁴¹

15. We also find no merit in PLDT's arguments with respect to the precedent-setting value of the *2003 Bureau Order*,⁴² or the relationship between the policies articulated in that order and those set forth in the *ISP Reform Order*.⁴³ PLDT has not provided new facts with respect to those arguments, and we therefore need not consider the merits of those arguments here again.⁴⁴ We note, however, that the Commission has the discretion to consider the effects of precedent in its decisions. Indeed, the Commission may consider whether vacatur will eliminate substantial and numerous disputes other than the one in which the order at issue was released.⁴⁵ In making such a determination, the Commission considers the public interest in maintaining any precedential effect of the order in question.⁴⁶

16. We also reject PLDT's renewed argument that the Commission's failure to vacate the Bureau's Order as moot violates the rules of international comity and ill-serves the public interest of the Philippines and the United States. The Commission specifically addressed the issues of comity and its role in protecting the public interest in the *Order on Review*. Specifically, the Commission stated that the International Bureau properly found that "the Commission has the authority and the responsibility to oversee and regulate rates authorized U.S. carriers agree to pay foreign carriers to the extent those rates affect U.S. competition and consumers, despite the indirect effect on a foreign market."⁴⁷ The Commission noted that it is well-settled that our authority over U.S.-international settlement rates and practices is not an assertion of extraterritorial regulation of foreign carriers; rather, it is a constraint over U.S. carriers to protect the public interest.⁴⁸ Nothing in PLDT's Petition for Reconsideration gives us reason to doubt the Bureau's or the Commission's conclusions.

⁴¹ See *Starpower*, 19 FCC Rcd at 7592 ¶ 1. See also *Core Communications Inc. v. Verizon Maryland Inc.*, Order, File No. EB-01-MD-007, 19 FCC Rcd 18513 (Enf. Bur. 2004). See, e.g., *U.S. Bancorp Mortgage*, 513 U.S. 18, 28 (stating that "while the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may deter settlement at an earlier stage. Some litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or as in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.") (emphasis in original).

⁴² PLDT argues that the Commission's refusal to vacate the *2003 Bureau Order* to preserve it as precedent contradicts its statement that the *2003 Bureau Order* does not expand the definition of whipsawing but merely reaffirms existing Commission rules and policies on whipsawing. PLDT also argues that the *2003 Bureau Order* has no precedential value in view of the Commission's *ISP Reform Order*. PLDT argues that if the *2003 Bureau Order* merely interpreted the Commission's prior rules, that interpretation lacks all future relevance as the Bureau's interpretation is completely subsumed into the Commission's newly stated rules and policies as set forth in the *ISP Reform Order*. See PLDT Petition for Reconsideration at 6-7.

⁴³ PLDT argues that principles of comity and the Commission's public interest standard support vacating the Bureau's Order. See PLDT Petition for Reconsideration at 7.

⁴⁴ See *Order on Review*, 19 FCC Rcd at 10012, ¶ 36.

⁴⁵ *Cavalier v. VEPCO*, 17 FCC Rcd at 24420, ¶¶ 17-18.

⁴⁶ *Id.* at 24419-20, ¶ 16 (citing *Aetna Casualty and Surety Co. v. Home Insurance Co.*, 882 F. Supp. 1355 (S.D.N.Y. 1995)).

⁴⁷ See *Order on Review*, 19 FCC Rcd at 10010-11, ¶ 32; *2003 Bureau Order*, 18 FCC Rcd at 3531-2, ¶ 15; *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

⁴⁸ See *Order on Review*, 19 FCC Rcd at 10010-11, ¶ 32; *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). See also *2004 ISP Reform Order*, 19 FCC Rcd at 5742, ¶ 74.

17. **Conclusion.** The Petition for Reconsideration presents no facts or arguments that would cause us to reverse the International Bureau's *March 10, 2003 Order* or the Commission's *Order on Review*. PLDT has not satisfied either the showing required for reconsideration of the *Order on Review* or the heavy burden of demonstrating that there are special circumstances beyond the mere fact of settlement of a controversy that warrant vacating the underlying International Bureau order. We, therefore, deny PLDT's petition for reconsideration and request for vacatur.

IV. EXEMPTION OF THE U.S.-PHILIPPINES ROUTE FROM THE ISP

18. In this Order, we resolve the issue of whether the ISP should be lifted from the U.S.-Philippines route. We also address Access's request that we keep the ISP on the U.S.-Philippines route based on its supposition that that route may not be benchmark-compliant and that certain discrimination and competitive concerns exist on that route.⁴⁹ For the reasons set forth below, we find it appropriate to lift the ISP from the U.S.-Philippines route pursuant to the policies set forth in the *ISP Reform Order*.⁵⁰

19. **Discussion.** In the *ISP Reform Order*, the Commission provided that it will lift the ISP from a U.S.-international route that is benchmark-compliant after opportunity for comment and a full review of any issues that have been raised with regard to that route.⁵¹ In this case, we find, as an initial matter, that the U.S.-Philippines route is benchmark-compliant. AT&T, Sprint, and MCI have certified that their interim rate agreements with Philippine carriers are benchmark-compliant,⁵² and there is no evidence in the record to refute these certifications. Access, however, argues that while these interim rate agreements are below benchmark, it is likely that these agreements are above previously negotiated rates of \$0.08 per minute for termination on fixed networks and \$0.12 per minute for termination on mobile networks.⁵³ Although there may be evidence to suggest that the current interim rates are above previously negotiated rates on the U.S.-Philippines route, we reiterate that the standard for determining whether to lift the ISP from a particular route is whether that route is benchmark-compliant.⁵⁴ We have found that, based upon U.S. carriers' certifications, the current interim rates on the U.S.-Philippines route are below benchmark levels. Accordingly, we determine that the U.S.-Philippines route is benchmark-compliant for purposes of exempting this route from the ISP. To the extent that Access's allegations may suggest that current rates on this route are above cost or that our current benchmark levels may be too

⁴⁹ See, e.g., Access Comments at 3-8; Access Reply at 1-3; Sept. 23 Access Letter.

⁵⁰ See *ISP Reform Order*, 19 FCC Rcd 5709.

⁵¹ See *id.* at 5724, ¶¶ 27-29.

⁵² See Sept. 24 AT&T Letter; Sept. 28 Sprint Letter; MCI Comments; Oct. 4 AT&T Letter; Oct. 5 MCI Letter; Oct. 5 Sprint Letter.

⁵³ See, e.g., Access Comments at 5-6; May 4 Access Letter at 3 (stating that it "has heard rumors that some U.S. carriers have agreed to pay \$0.12 per minute to terminate traffic to the Philippines (\$0.16 for mobile termination). It has also heard reports (unconfirmed) that several of the major U.S. carriers are having their traffic terminated for less than those rates."); Mar. 30 Access Letter at 2 ("While Access has no reason to doubt the representations of the carriers that the current interim, unfiled and secret rates are below benchmark, there seems to be little doubt that the rates are higher than they were in early 2003 when the Philippine carriers engaged in systematic traffic disruption for the express purpose of forcing increases in their settlement rates."). Access also notes that because the Commission does not presently require carriers to file interim agreements under the ISP, the Commission cannot verify whether these negotiated interim rates exceed previously negotiated levels even if they are below the relevant benchmark. As we explained in the *Order on Review*, however, the Commission "does not require carriers to file interim agreements under the ISP.") *Order on Review*, 19 FCC Rcd at 9995, n.9. Because certain transparency issues arise with regard to interim agreements, we may examine the issue of such agreements at a later point.

⁵⁴ See *ISP Reform Order*, at 5724, ¶ 27 ("[w]e conclude that it would be in the public interest to modify our ISP policy by removing the ISP requirements from all U.S.-international routes on which U.S. carriers have negotiated benchmark-compliant rates.").

high on this and other routes, we note that these issues are more appropriately raised in a broader context and should not forestall exempting the U.S.-Philippines route from the ISP under established policy.⁵⁵ We will continue to review changes in the international marketplace to determine whether further action with regard to our Benchmarks Policy is necessary or would be effective in bringing settlement rates closer to cost.⁵⁶

20. Access also alleges that PLDT, the dominant telecommunications carrier in the Philippines, has engaged in certain anticompetitive pricing behavior directly and through its U.S. affiliate, PDLT (US) Ltd.⁵⁷ Specifically, Access claims that these companies sell retail services to consumers through international prepaid calling card offerings at prices below current settlement rates, which suggests potential price squeeze behavior.⁵⁸ Access also contends that PLDT distorts competition on the U.S.-Philippines route by refusing to make Philippine toll free numbers available to Access and other U.S. carriers. In essence, Access contends that a calling card sold by Access in the U.S. cannot be used to originate a call in the Philippines, while a calling card sold by PLDT US can be used to originate a call in the Philippines.⁵⁹ As we explain below, we do not find that these allegations raise concerns that warrant retaining the ISP on the otherwise benchmark-compliant U.S.-Philippines route.

21. We are not persuaded by Access's price squeeze allegations; it is unclear whether PLDT and its U.S. affiliate are engaging in price squeeze behavior based on the information that Access has provided us.⁶⁰ We also note that Access is the only carrier that raised potential price squeeze concerns. If PLDT were engaged in price squeeze behavior, other U.S. carriers would likely raise similar concerns because the Philippines is a major route, and a price squeeze would affect the profitability of all unaffiliated U.S. carriers that serve that route. Further, it is unlikely that a price squeeze strategy would benefit PLDT. PLDT cannot reasonably expect to put major U.S. facilities-based carriers out of business on the Philippines route, as these U.S. carriers could match rate cuts by PLDT (US). Moreover, every minute of use that PLDT (US) would be able to acquire from other U.S.-international carriers and sell below cost would be a financial loss to PLDT and its affiliate.⁶¹ Because PLDT would not be able to drive large rivals out of business, PLDT and its affiliate would be unable to recoup these losses by

⁵⁵ See *id.* at 5747-78, ¶ 85 ("Carriers and other parties are free to make appropriate filings with the Commission requesting policy changes via petitions for rulemaking or other regulatory actions that they may believe are necessary. Carriers and other parties may also petition the Commission for a declaratory ruling that particular settlement rates, while below benchmarks, are unjust and unreasonable because they are well above costs.").

⁵⁶ See *id.* at 5747-48, ¶ 85.

⁵⁷ *Foreign Carrier Public Notice*, 19 FCC Rcd at 20390.

⁵⁸ September 23 Access Letter at 2. See *International Settlement Rates*, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd 19806, 19902, ¶ 211 (1997) ("where the U.S. affiliate [of a foreign carrier] sets its prices below its own costs of providing service, the lower prices may be the result of a predatory price squeeze and distort competition").

⁵⁹ September 23 Access Letter at 2-3.

⁶⁰ Access contends that if settlement rates are at \$0.12 per minute and PLDT (US)'s retail rates at \$0.137 per minute, PLDT is engaged in price-squeeze behavior. According to Access, PLDT (US) pays a 30 percent commission to sellers of its phone cards. Assuming settlement rates of \$0.12 per minute, a 30 percent commission would place the \$0.137 per minute phone card rate below the settlement rate, indicating the possibility of a price squeeze against unaffiliated U.S. carriers. Sept. 23 Access Letter. Even if this were true, there may be alternative explanations for such pricing, e.g., limited-time promotions to gain market share. See *International Settlement Rates*, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd 19806, 19910, ¶ 225 (1997) (*Benchmarks Order*), *Report and Order on Reconsideration and Order Lifting Stay*, 14 FCC Rcd 9256 (1999), *aff'd sub nom. Cable and Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

⁶¹ These minutes represent a loss from the standpoint of the revenue PLDT could have earned if all service by all U.S. carriers, including its affiliate, reflected the full settlement rate.

subsequently raising rates to monopoly levels. Finally, although Access alleges price squeeze behavior, it does not request that the Commission conduct an investigation into the allegation, nor does it provide the type of evidence that the *Benchmark Order* requires of carriers seeking investigation of such allegations.⁶²

22. We are also not persuaded by Access's argument that PLDT is distorting competition by refusing to make Philippine toll free numbers available to Access and other U.S. carriers.⁶³ According to Access, an Access calling card sold in the United States cannot be used to originate a call in the Philippines while a calling card sold by PLDT US can be used to originate a call in the Philippines.⁶⁴ Although Access claims that it cannot offer services in the Philippines route that would permit it to compete effectively with PLDT (US) in the provision of services, Access has not provided sufficient evidence to support its argument of anticompetitive activities on the part of PLDT or its affiliates. Additionally, it appears that Access's inability to use toll free numbers to originate outbound international calls from the Philippines for Access's customers may be a result of domestic Philippine telecommunications regulation.⁶⁵ Accordingly, we believe that the Philippine regulatory authority is in better position to evaluate the evidence and the concerns raised by Access. We note, however, that because we have previously found anticompetitive activity in the Philippines route on the part of PLDT, we plan to monitor this situation and take any action necessary to ensure competition on the U.S.-Philippines route.⁶⁶

23. **Conclusion.** As we explained above, we find that the U.S.-Philippines route is benchmark-compliant, and there is no evidence in the record to rebut these representations. We also find that Access has not offered sufficient evidence to demonstrate competitive concerns on the route that would warrant retaining the ISP. Accordingly, after a review of the record, we find that it is appropriate to remove the ISP from the U.S.-Philippines in accordance with the policies that we adopted in the *ISP Reform Order*.

V. SUMMARY

24. For the reasons set forth above, we affirm, in the Order on Reconsideration, the Commission's *Order on Review*⁶⁷ that upheld a International Bureau⁶⁸ finding that six Philippine carriers had engaged in anticompetitive conduct and had disrupted service on the U.S.-Philippine route, to the detriment of U.S. consumers, and we exempt, in our Order, the U.S.-Philippines route from the International Settlements Policy (ISP) in accordance with the policies that we adopted in the 2004 *ISP Reform Policy*.

⁶² See *Benchmarks Order*, 12 FCC Rcd 19806.

⁶³ See, e.g., Sept. 23 Access Letter; Mar. 30 Access Letter.

⁶⁴ Sept. 23 Access Letter.

⁶⁵ Letter from Henry Goldberg and Jonathan Wiener, Attorneys for Philippine Long Distance Telephone Company, to Marlene Dortch, Secretary, Federal Communications Commission, Re: Request for Further Information Regarding IB Docket 03-38, 02-324, 96-261 (filed Apr. 12, 2005) ("Under Philippines law and regulation, only International Gateway Facility (IGF) licensed operators are authorized to originate international calls from the Philippines.")

⁶⁶ *Order on Review*, 19 FCC Rcd 9993; 2003 *Bureau Order*, 18 FCC Rcd 3519.

⁶⁷ See *Order on Review*, 19 FCC Rcd 9993.

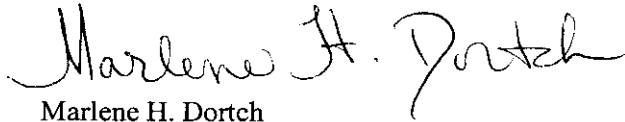
⁶⁸ 2003 *Bureau Order*, 18 FCC Rcd 3519.

VI. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 5, 201, 214, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 201-205, 214, 303(r), 309 and Sections 1.3 and 1.115 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.115, that the Petition for Reconsideration of the Commission's *Order on Review* and the International Bureau's *March 10, 2003 Order* filed by PLDT is DENIED.

26. IT IS FURTHER ORDERED, pursuant to the *ISP Reform First Report and Order* and sections 0.51 and 0.261 of the Commission's rules, 47 C.F.R. §§ 0.51 and 0.261 that the U.S.-Philippines route is removed from the ISP.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary